No. 179.

Brief of Burnett for P. C. Co.

Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

No. ~~585~~ 179.

THE LOUISVILLE WATER COMPANY, . . Plaintiff in Error,

VERSUS

THE COMMONWEALTH OF KENTUCKY, . Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF FOR THE PLAINTIFF IN ERROR ON MOTION OF DEFENDANT TO DISMISS OR AFFIRM.

PRINTED BY THE BRADLEY & GILBERT COMPANY.

SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY, ... } DEFENDANT IN ERROR.

The motion of defendant in error to dismiss or affirm rests upon the hypothesis that the act of the 22d of April, 1882, did not constitute a contract between the plaintiff and defendant in error. The act of the 22d of April, 1882, amending the charter of the Water Company and exempting it from the payment of taxes of all kinds, State, municipal, and special, provided:

> "1. It shall be the duty of the Louisville Water Company to furnish water to the public fire cisterns and public fire plugs or hydrants of the city of Louisville for fire protection free of charge.
>
> "2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, State, muncipal, or special. This act shall take effect from and after its passage." 1 Sess. Acts, 1882, p. 915.

The construction of this act was before this Honorable Court in the case of the Louisville Water Company, plaintiff in error, against William Clark, sheriff of Jefferson County, defendant in error, reported in 143 U. S., page 1. Opinion of the Court by Justice Harlan.

In that case the then Chief Justice of the Court of Appeals of Kentucky, having refused a writ of error, on the 15th day of December, 1890, a motion was made in open court for a writ of error in that case to the Court of Appeals of Kentucky, and on the 5th day of January, 1891, the following order was made by this court:

> "Supreme Court of the United States, October Term, 1890. *Ex parte:* In the matter of the Louisville Water Company, petitioner. On petition for a writ of error.
>
> "It is ordered by the court that counsel be given until the third Monday in January, instant, to file printed briefs upon the question of the existence of the contract, the impairment of which is claimed to justify the issuance of the writ applied for.
>
> "January 5, 1891."

And in that case, on the 26th of January, 1891, the following order was made:

> "Supreme Court of the United States, October Term, 1890. *Ex parte:* In the matter of the Louisville Water Company, petitioner. On petition for a writ of error.
>
> "On consideration of the petition for a writ of error herein, and of the argument of counsel thereupon had, as well in support of as against the same, it is now here ordered by the court that said petition be, and the same is hereby, granted."
>
> "January 26, 1891."

See record and case, 143 U. S., page 1.

The act of 22d of April, 1882, was accepted by the Water Company, and from its date to the 15th of September, 1886, the day on which the act known as chapter 92, General Statutes of Kentucky, took effect, did furnish an abundant supply of water to the public fire cisterns and public fire plugs and hydrants of the city of Louisville for fire protection free of charge. (See Record, pages 10 and 21.)

The charter of the Louisville Water Company was approved March 6th, 1854, being an act to incorporate the Louisville Water Company, see second volume of Acts Kentucky Legislature, 1853–54, page 121, the sixth section of which provides, among other things:

"In the laying and constructing of pipes and aqueducts in the city of Louisville the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires, and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed upon between it and the authorities of said city."

After the act of 22d April, 1882, and in accordance therewith, an abundant supply of water for all such purposes was furnished by the Water Company free of charge down to and including the year 1886. The charter of the plaintiff in error and all amendments thereto, and all the revenue laws of the State of Kentucky, including the revenue act of May 17th, 1886, being chapter 92 of the General Statutes, Edition of 1887, were reviewed by this Honorable Court in the case of the Louisville Water Company against Clark, sheriff, 143 U. S. Reports, page 1. In that case (which involved only taxes for the year 1887) it was determined that the act approved February 14th, 1856, entitled "An act reserving power to amend and repeal charters and other laws," should be read as a part of the act of 22d of April, 1882, and that under this reserved power the State could repeal the exemption from taxation by the passage of the revenue law approved the 17th of May, but which, by its terms, took effect the 15th of September, 1886, and used this language:

"In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water, for fire protection, free of charge except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purposes free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company

should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the act of 1882 in respect to its right to charge for water furnished for public fire cisterns, fire plugs, or hydrants."

We therefore conclude that there was a contract created by the act of 1882, and that it existed from that date until under the provisions of the act of 1856, read in connection with said act, it was repealed by the revenue act approved the 17th of May, 1886, and, that as the obligation to furnish water for fire protection free of charge continued from the 22d of April, 1882, to the date of the revenue act of 1886, approved the 17th of May, and took effect the 15th or September, it must follow that the exemption from taxation continued for the same period. It follows that an attempt to collect the tax for the year 1886 is an attempt to destroy rights previously vested by the obligation of the contract. If the conclusion is right that this exemption from taxation was withdrawn by the revenue act of 1886, any attempt to collect from the plaintiff in error taxes upon its property between the 22d of April, 1882, and the 17th of September, 1886, whether by virtue of the law of 1886, or any law subsequent thereto, violates the plaintiff's right of protection under its contract.

The taxes under consideration in this case are for the fiscal year of the State of Kentucky ending June 30th, 1886, General Statutes, page 652, Edition of 1887 (see Appendix 1), a year covered by the period during which the contract of exemption as set out in the act of April 22d, 1882, was in full force, and our next step in the development of this case is to determine when the statute was passed under the authority of which the taxes in question were assessed and levied and the action for their recovery instituted and prosecuted to a judgment. The act of April 22d, 1882, was in conflict with section 1, article 1, and section 23, article 8, of chapter 92, General Statutes, Edition of 1873, and effected the repeal of every statute in the State of Kentucky fixing

a rate of taxation or levying or imposing a tax upon the plaintiff in error or its property.

By section 22, chapter 21, General Statutes (See Appendix 1), Edition of 1873, in force on the 22d day of April, 1882, and thereafter and now in force, it was enacted that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

If the act of April 22, 1882, gave to the plaintiff in error the benefits of the exemption and immunities therein provided for, it is clear that to that extent the act of April 22d, 1882, effected a repeal of the Revenue Laws of the State of Kentucky in so far as they authorized, suffered, or permitted the fixing of a rate of taxation or the levying or the imposition of a tax upon the plaintiff in error or its property, or the assessment of the plaintiff in error or its property for taxation by the State, or the collection from the plaintiff in error by coercive measures of any tax imposed by the State. This court takes judicial notice of the fact that the General Assembly of the Commonwealth of Kentucky never did re-enact the Revenue Laws, repealed by the act of April 22d, 1882, so far as the plaintiff in error and its property were concerned, in direct terms, and that the only re-enactment of such laws was by indirection, and is found in section 25, article 6, of the act approved May 17th, 1886, which provides that: "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book for his county, and certify the same to the auditor on or before the last day of January in each year."

It is the contention of the plaintiff in error in this case that in so far as said section and article authorizes an assessment of its property or the imposition of a tax upon it for the year 1886, in which year its property was omitted by the assessor, and in which year it omitted to list its property with the auditor, impairs the obligation of the contract set out in the act of the 22d of April, 1882.

As will be seen, section 25, article 5, of the act of May 17th, 1886 (Appendix 1), undertakes to put into force and to revise, so far as the plaintiff in error and its property is concerned during

the period of time the act of April 22d, 1882, was in force, all the revenue law and provisions of the revenue laws that were repealed, in so far as the plainriff in error and its properties were concerned, by the act of April 22, 1882.

The contention of the defendant in error that the act approved April 22d, 1884, entitled: "An act to amend the revenue laws," vol. 1, page 70–71, Sess. Acts of 1883–84, was an authority for the assessment, imposition, or collection of the taxes under consideration in this case, is founded on a misconception of the act itself, as will be seen from section 5 of that act, which in express terms provides that "this act shall not apply to any tax payable by any corporation on its corporate stock, but only to cases where an ad valorem tax is levied." (Appendix 2). The act discloses that there is no express repeal in it of the act of April 22d, 1882, or any reference in it to the act of April 22d, 1882, other than in this language, "that this act shall apply only to cases where an ad valorem tax is levied." Now, on the 22d day of April, 1884, no ad valorem tax was levied by the State on the plaintiff in error or its property, and it is expressly set out in the act of the 22d of April, 1884, that it was not to apply in a case where no ad valorem tax was levied.

By section 6 of the act approved April 22d, 1884, it is provided "that all laws and parts of laws inconsistent herewith are hereby repealed." Now, as the act of April 22d, 1882, is not irreconcilable with or repugnant to any provision contained in the act of April 22d, 1884, as both acts can be enforced in the same territory at the same time, and full effect given to each, it is perfectly clear that the act of April 22d, 1884, furnishes no authority for the imposition, assessment, or collection of the tax under consideration in this case. It is clear that unless the act of April 22, 1884, operated as a repeal of the act of April 22d, 1882, that it furnished no authority for the imposition of any tax on the plaintiff in error or its properties, or the assessment of the plaintiff in error or its properties, for taxation by the State.

Not only was there no authority given by the act approved April 22d, 1884, for the imposition, assessment, and collection of the taxes under consideration in this case, but the act itself was repealed by the act approved May 17th, 1886, that went into effect on September 15th, 1886.

In the case of the Commonwealth *vs.* the Railroad Companies, 95th Ky., pages 68 to 75 inclusive, the Court of Appeals, in deter-

mining the effect of the act aproved May 17th, 1886, upon the act as approved May 22d, 1884, and kindred acts, say:

> "In determining the force and the effect of this latter act on prior legislation, general and special, regulating taxation in the Commonwealth, it is evident that its general purpose and intent should be given much weight. Manifestly the act of 1886 *is intended to compass the reform of the entire revenue law of the State, to constitute in itself a general and complete revenue system.* As argued by counsel, it singles out no special defect here and there, but is aimed broadcast at the whole structure, else why should it have reenacted as it does many old laws in identical and equivalent terms. This general purpose to be made effective and uniform must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice. We notice first that all property, real and personal, shall be assessed for taxation, save that expressly exempted in the act itself. Not content with this, the act proceeds to repeal all acts and parts of acts, general and special, inconsistent with itself or not in conformity to itself." Sunderland on Statutory Construction, sections 154–155–156; Endlich on the Interpretation of Statutes, section 201.

As the act of April 22d, 1884, was inconsistent in many of its provisions with the act of May 17th, 1886, the latter act, on the rules laid down by the Kentucky Court of Appeals, and according to the recognized canons of construction, repealed the act of the 22d of April, 1884. 143 U. S., page 2.

The taxes under consideration in this case were assessed and levied on the 9th day of January, 1891, more than four years and three months after the same went into effect, under authority of section 25, article 6, of the act of May 17th, 1886, more than four years and three months after the act of April 22, 1884, had been repealed by the act of May 17th, 1886. In the opinion delivered by the Kentucky Court of Appeals in this case, it will be found recited in the opinion of that court, page 26 of the record, that:

> "The authority for reporting the tax list to the clerk of the county court is to be found in section 25, article 6, chapter 92 of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows:

'It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's books for his county, and certify the same to the auditor on or before the last day of January in each year. The law does not specify how and in what manner or form the report shall be made, and that it appears that the clerk accepted the report and certified the same, as required by law, the report of the sheriff and the certificate of the clerk must be held sufficient for the purposes of this action. . . . . The act of the 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues, not to decrease them, and it expressly excepted all obligations incurred under existing laws from repeal. It is, therefore, clear that if appellant had become liable for the tax of 1886, the act supra did not release it from such liability, nor can we agree with the appellant that the act supra is only prospective. The evident purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with, and there is nothing in the act to authorize the conclusion that the power and the duty devolved upon the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act. Appellant insists that the revenue law of 1892 repealed the act of 1890, which authorized the bringing of such suits as this. We do not concur in the appellant's construction of the act of 1892. We do not think it was the intention of the legislature to repeal the act of 1890."

We thus have the express decision of the Court of Appeals to the effect that section 25, article 6, of the act approved on the 17th of May, 1886, was the authority, and is the authority, for the assessment and imposition of the tax under consideration in this case; so that it is clear that the obligation of the contract as contained and set out in the act of April 22d, 1882, in so far as it secured an exemption against the assessment and imposition of the tax, is violated by this subsequent legislation. But as seen from the opinion of the Court of Appeals, section 25, article 6, of

the act approved May 17th, 1886, was and is supplemented and amended by an act of the General Assembly of the Commonwealth of Kentucky, approved on the 23d day of May, 1890, entitled:

> "'An act to amend the revenue laws of the Commonwealth of Kentucky, giving the State the power to sue for taxes.' Vol. 1, pages 149–150, Sess. Acts 1889–90, and which is in words and figures as follows: 'The right and the power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which cannot be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason cannot be sold, and for the purpose of reaching intangible property which cannot otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same.'" (Appendix 2.)

Prior to May 23d, 1890, it had become the settled law of the State of Kentucky that the properties of the defendant in error could not be taken, levied on, or sold by the sheriff or collecting officer to coerce the payment by it of any tax or assessment against it or upon its property, and it had further become the settled law of the State of Kentucky that the State was without power to go into its courts and maintain an action against the plaintiff in error to recover any tax or assessment against the defendant in error or upon its property.

In the case of the Louisville Water Company *vs.* Hamilton, 81 Ky., 522, the Court of Appeals say:

> "This corporation, like a turnpike or railroad, can not be seized or sold by a collecting officer, nor the property necessary for its use, so as to deprive the public of the benefit to be derived from it, unless by legislative authority."

In the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 249, the Court of Appeals say:

"It was held by this court in the case of Baldwin *vs.* Hewitt, auditor, &c., 88 Ky., 673, that taxes could not be recovered by suit in the absence of legislative authority, and there being no statute in this State save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. . . . . And the exercise of the power of taxation is legislative in character, while the collection of taxes when once authorized by the law making power is ministerial. The one is legislative, the other executive; neither is a judicial act, and one department of the government should be careful not to encroach upon the dominions of another. It is true that the judiciary may be called upon by the legislature to enforce the collection of taxes in a judicial way, but it has not done so in this State save as to railroads, where suit has been authorized to recover them, and this exceptional case inferentially says that the remedy can not be resorted to in other cases. . . . . The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it can not do so. We do not intimate whether in this instance the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If in such a case the State is likely to lose any of its revenue, the legislature can, by additional legislation in the form of penalties for the non-payment, or by authorizing suit for its recovery, provide against it, and will no doubt do so when in its wisdom it may be proper and necessary."

In the case of the Louisville Water Company *vs.* Clark, &c., 94 Ky., 54, the Court of Appeals say that the reason for the reversal by the Court of Appeals of the judgment of the court of first instance in the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 244, was that the court of first instance had no jurisdiction of the subject-matter of the action.

In the case of Baldwin *vs.* Hewitt, 88 Ky., 682, the Court of Appeals say:

"The same reason which forbids the court to levy a tax forbids it from assuming the power to collect it."

In the case of McLean *vs.* Deposit, 81 Ky., 258, the court say:

"The judiciary has no power to levy taxes or to collect taxes when the officer appointed to collect them refuses to do so, or if no one is appointed to collect the judiciary is powerless to supply the defect. These are all legislative duties, and when the department of government to which these duties are confided neglects to discharge them, neither the judiciary or executive department of the government can execute these powers."

In the case of Merriwether *vs.* Garrett, 102 U. S., 472–573, this court, considering the same subject, say:

"Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced."

We thus see that not only were the taxes under consideration in this case assessed and levied under the authority of section 25, article 6, of the act of May 17, 1886, but their collection was provided for by the act of 23d of May, 1890, legislation that went into effect at least four years and six months in one instance and more than eight years in the other instance after the date of the contract relied upon by the plaintiff in error as securing to it the exemption from liablity for the taxes sued for, and hence it does certainly appear that the legislation complained of was subsequent to the date of the contract set up by the plaintiff in error, and it was legislation under which every right claimed by the plaintiff in error as vested in it by the contract of April 22d, 1882, was taken from it by the judgment of the courts of the State of Kentucky, and which furnishes the foundation for the writ of error in this action.

To this action, commenced upon the 9th day of January, 1891, to recover a tax from the plaintiff in error for the fiscal year of the State of Kentucky ending June 30, 1886, imposed and assessed under the authority of section 25, article 6, of the act approved May 17, 1886, and which did not go into effect until the 15th of September, 1886, and to this action thus commenced against it under the authority of an act approved on the 23 day of May,

1890, the plaintiff in error interposes as a defense the exemption from liability sought to be enforced against it in the action, secured to it by the act of April 22d, 1882, and which act was in force up to the 15th of September, 1886, covering the identical period of time for which the alleged taxes were levied. The plaintiff in error asserted in its answer that this contract exemption was protected by the Federal Constitution against any impairment of its obligation by the subsequent legislation of Kentucky authorizing the imposition and the assessment of the taxes in question and the action or suit against it for their recovery. This contention of the plaintiff in error was met by a decision of the court of first instance, and by the court of last resort in the State of Kentucky, that the act of April 22, 1882, did not constitute a contract between the State of Kentucky and the Louisville Water Company, that it was not supported by any valuable consideration or public service, and did not secure the immunity from taxation as contended for by the plaintiff in error, and hence the Federal question that gives to this court jurisdiction is whether or not it is with this court or the courts of Kentucky to determine whether the act of April 22, 1882, constitutes a contract, the obligations of which are protected by the Federal Constitution from impairment by said legislation.

AS TO JURISDICTION.

Whether the act approved April 22d, 1882, does or does not constitute a contract, is a question upon which this court acts independent of the decision of the State courts, and as to whether or or not the subsequent acts of the General Assembly impaired the obligation of that contract is a question for the independent action of this court.

In the case of Delmas *vs.* Insurance Company, 14 Wallace, 661, this court say:

> "In the prosecution of that enquiry this court must decide for itself whether any valid contract existed when the legislation complained of was had, and in making up its judgment on that question is not concluded by the decisions of the State court."

In the case of University *vs.* People, 99 U. S., 309, this court say:

> "Whether the statute of 1855 is a valid contract or is void by reason of its conflicting with the Constitution of

1848, under which it was made, is a question on which the judgment of this court can be reviewed here."

In the case of Vicksburg Railroad Company *vs.* Dennis, 116 U. S., 667, that court say:

> "In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract."

In Wright *vs.* Nagle, 101 U. S., 791, this court say:

> "The construction by the State court of a statute under which a court made an exclusive grant of such franchise within designated limits upon conditions which the grantee performed is not conclusive here upon the question whether a subsequent conflicting grant impairs the obligation of a contract." Louisville & Nashville Railroad *vs.* Palmer, 109 U. S., 256; the Ohio Life Insurance and Trust Company *vs.* Debolt, 16 Howard; Wright *vs.* New Jersey, 117 U. S., 1024; Jefferson Branch Bank *vs.* Shelly, 66 U. S., 173; Murrey *vs.* Charleston, 96 U. S., 432 to 449; Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116; Furman *vs.* Nichol, 8 Wallace, 44; Williams *vs.* Bruffy, 96 U. S., 176–193; Arrowsmith *vs.* Marmoning, 118 U. S., 194; Chicago *vs.* Needles, 113 U. S., 574; Northern University *vs.* the People, 90 U. S., 309; Baltimore *vs.* Maryland, 21 Wallace, 456; Weston *vs.* Charleston, 2 Peters, 499.

That the contract was supported by a public consideration or a public service, see New Orleans Water Works Company *vs.* Rivers, 115 U. S., 527; Ohio Insurance Company *vs.* Debolt, 16 Howard, 428; 84th Ky., 166.

The contract of exemption from taxation for the consideration aforesaid having existed from the 22d of April, 1882, to the 17th day of September, 1886, and the judgment of the highest court in the State of Kentucky having determined that the attempt to assess and collect the taxes for the year 1886 was derived from the 25th section, article 6, chapter 92, of the General Statutes, commonly known as the Hewitt bill, which took effect September 15th, 1886, being for taxes prior to the repeal of the exemption, see pages 26 and 27 of record, and of the act of 23d of May, 1890, also subsequent to the repeal by the Revenue Act of 1886,

make it clear that the two specified acts are laws impairing the obligation of the contract, and are an invasion of rights previously vested. For these reasons we ask that the motion to dismiss be denied, and that the case be reversed.

Respectfully submitted,

T. L. BURNETT, AND
LANE & BURNETT,
Counsel for Plaintiff in Error.

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Louisville Water Company *vs.* Clark, Sheriff, 143 U. S., page 1.

Water Company *vs.* Commonwealth, 89 Ky.

Baldwin *vs.* Hewitt, Auditor, &c., 88 Ky., 673.

Merriwether *vs.* Garrett, 102 U. S., 472 to 573.

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Wright *vs.* New Jersey, 117 U. S., 1024.

Jefferson Branch Bank *vs.* Shelly, 66 U. S., 173.

Murrey *vs.* Charleston, 96 U. S., 432 to 449.

Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116.

Furman *vs.* Nichol, 8 Wallace, 44.

Williams *vs.* Bruffy, 96 U. S., 176–193.

Arrowsmith *vs.* Marmoning, 118 U. S., 194.

Chicago *vs.* Needles, 113 U. S., 574.

Northern University *vs.* the People, 90 U. S., 309.

Baltimore *vs.* Maryland, 21 Wallace, 456.

Weston *vs.* Charleston, 2 Peters, 499.

New Orleans Water Works Company vs. Rivers, 115 U. S., 527.

APPENDIX.

Section 1, chapter 42, General Statutes, page 652:

> "The present fiscal year shall close on the thirtieth day of June, 1882, and thereafter the fiscal year shall begin with the first day of July and close with the thirtieth day of June following, and all regular reports and statements of accounts required by law of the various offices of State shall be made accordingly."

Section 22, chapter 21, General Statutes, page 294:

> "When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the General Assembly."

Section 25, article 6, chapter 92, General Statutes, page 1060:

> "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book, for his county, and certify the same to the auditor on or before the last day of January in each year; and the said sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent. on the taxes realized on said assessment. But this section does not include property erroneously described by the assessor."

Sections 5 and 6, chapter 970, Acts of 1883–84, page 71:

> "This act shall not apply to any tax payable by any corporation on its capital stock, but only to cases where an *ad valorem* tax is levied; nor shall it in anywise be deemed as a repeal or modification of section ten, of article twelve, of chapter ninety-two, of the General Statutes."

"All laws and parts of laws inconsistent herewith are hereby repealed."

An act to amend the revenue laws of the Commonwealth, giving the State the power to sue for taxes. Vol. 1, pages 149–150, Sess. Acts of 1889–1890:

"The right and power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which cannot be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason cannot be sold, and for the purpose of reaching intangible property which cannot otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same."

No. 179.

Brief of Burnett for P. E.

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SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . . Plaintiff in Error,

VERSUS

COMMONWEALTH OF KENTUCKY, . Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

T. L. BURNETT,
LANE & BURNETT,
For Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

LOUISVILLE WATER COMPANY, . . PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

This writ of error is prosecuted to reverse a judgment of the Court of Appeals of Kentucky filed March 27, 1896. By an act of the General Assembly of the Commonwealth of Kentucky approved 22d of April, 1882, amending the charter of the Louisville Water Company and exempting it from the payment of taxes of all kinds—State, municipal, and special—it was provided:

> "1. It shall be the duty of the Louisville Water Company to furnish water to the public fire-cisterns and public fire-hydrants of the city of Louisville for fire protection free of charge.
>
> "2. The Sinking Fund of the city of Louisville being the owner of the stock of the Louisville Water Company, and said water company by virtue thereof is the property of the city of Louisville, therefore the Louisville Water Company is hereby exempt from the payment of taxes of all kinds, of whatever character, State, municipal, or special. This act shall take effect from and after its passage." I Sess. Acts, 1882, p. 915.

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The construction of this act was before this Honorable Court in the case of the Louisville Water Company, plaintiff in error, against William Clark, sheriff of Jefferson County, defendant in error, reported in 143 U. S., page 1. Opinion of the court by Justice Harlan.

The act of 22d of April, 1882, was accepted by the Water Company, and from its date to the 15th of September, 1886 (the day on which the act known as chapter 92, General Statutes of Kentucky, took effect), did furnish an abundant supply of water to the public fire-cisterns and public fire-hydrants of the city of Louisville for fire protection free of charge. (See Record, pages 10 and 21.)

The charter of the Louisville Water Company was approved March 6, 1854, being an act to incorporate the Louisville Water Company, see second volume of Acts Kentucky Legislature, 1853–54, page 121, the sixth section of which provides, among other things:

> "In the laying and construction of pipes and aqueducts in the city of Louisville, the same shall be so laid and constructed that an abundant supply of water can be drawn therefrom for the extinguishment of fires, and said corporation shall furnish water to the city of Louisville for the extinguishment of fires and cleaning streets upon such terms as may be agreed upon between it and the authorities of said city."

After the act of 22d of April, 1882, and in accordance therewith, an abundant supply of water for all such purposes was furnished by the Water Company free of charge down to and including the year 1886. The charter of the plaintiff in error and all amendments thereto, and all the revenue laws of the State of Kentucky, including the revenue act of May 17, 1886, being chapter 92 of the General Statutes, edition of 1887, were reviewed by this Honorable Court in the case of the Louisville Water Company against Clark, sheriff, 143 U. S. Reports, page 1. In that case (which involved only taxes for the year 1887) it was determined that the act approved February 14, 1856, entitled "An act reserving power to amend and repeal charters and other laws," should be read as a part of the act of 22d of April, 1882, and that

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under this reserved power the State could repeal the exemption from taxation by the passage of the revenue law approved the 17th of May, which, by its terms, took effect the 15th of September, 1886, and used this language:

> "In determining the object and scope of the act of 1882, we must look at all of its provisions. The Water Company was under a duty by its charter, passed before the act of 1856, to furnish water for the extinguishment of fires and the cleansing of streets, not free of charge, but upon such terms as might be agreed upon by it and the city. And the legislature certainly did not assume to impose upon it the obligation to furnish water for fire protection, free of charge, except in connection with the grant to it of immunity from taxation. Accepting, however, the benefits of this exemption from taxation, it became bound to supply water for public purpose free of charge. But that obligation remained only so long as the exemption continued in force. The act of 1882 is to be regarded as an entirety, and meant nothing more than that the company should furnish water for fire protection, free of charge, so long as the immunity from taxation continued. This view is in harmony with the act of 1856, which expressly declares that whilst privileges and franchises granted to corporations, after its passage, could be changed or repealed, no amendment or repeal should impair other rights previously vested. The effect of the withdrawal of the immunity from taxation was, therefore, to leave the Water Company in the position it was before the passage of the act of 1882 in respect to its rights to charge for water furnished for public fire-cisterns, fire-plugs, or hydrants."

We therefore conclude that there was a contract created by the act of 1882, and that it existed from that date until under the provisions of the act of 1856, read in connection with said act, it was repealed by the revenue act approved the 17th of May, 1886, and, that as the obligation to furnish water for fire protection free of charge continued from the 22d of April, 1882, to the date the revenue act of 1886, approved the 17th of May, took effect, to-wit, the 15th of September, it must follow that the exemption from

taxation continued for the same period. It follows that an attempt to collect the tax for the year 1886 is an attempt to destroy rights previously vested by the obligation of the contract. If the conclusion is right that this exemption from taxation was withdrawn by the revenue act of 1886, any attempt to collect from the plaintiff in error taxes upon its property between the 22d of April, 1882, and the 15th of September, 1886, whether by virtue of the law of 1886, or any law subsequent thereto, violates the plaintiff's right of protection under its contract

The taxes under consideration in this case are for the fiscal year of the State of Kentucky ending June 30, 1886, General Statutes, page 652, edition of 1887 (see Appendix I), a year covered by the period during which the contract of exemption as set out in the act of April 22, 1882, was in full force, and our next step in the development of this case is to determine when the statute was passed under the authority of which the taxes in question were assessed and levied and the action for their recovery instituted and prosecuted to a judgment. The act of April 22, 1882, was in conflict with section 1, article 1, and section 23, article 8, of chapter 92, General Statutes, edition of 1873, and effected the repeal of every statute in the State of Kentucky fixing a rate of taxation or levying or imposing a tax upon the plaintiff in error or its property.

By section 22, chapter 21, General Statutes (see Appendix I), edition of 1873, in force on the 22d day of April, 1882, and thereafter and now in force, it was enacted that "when a law which may have repealed another shall be repealed, the previous law shall not be revived unless the law repealing it be passed during the same session of the General Assembly."

If the act of April 22, 1882, gave to the plaintiff in error the benefits of the exemption and immunities therein provided for, it is clear that to that extent the act of April 22, 1882, effected a repeal of the revenue laws of the State of Kentucky in so far as they authorized, suffered, or permitted the fixing of a rate of taxation or the levying or the imposition of a tax upon the plaintiff in error or its property, or the assessment of the plaintiff in error or its property for taxation by the State, or the collection from the plaintiff in error by coercive measures of any tax imposed by the State. This court takes judicial notice of the fact that the General Assembly of the Commonwealth of Kentucky never did re-enact

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the revenue laws repealed by the act of April 22, 1882, so far as the plaintiff in error and its property were concerned, in direct terms, and that the only re-enactment of such laws was by indirection, and is found in section 25, article 6, of the act approved May 17, 1886, which provides that, "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book for his county, and certify the same to the auditor on or before the last day of January in each year."

It is the contention of the plaintiff in error in this case that in so far as said section and article authorizes an assessment of its property or the imposition of a tax upon it for the year 1886, in which year its property was omitted by the assessor, and in which year it omitted to list its property with the auditor, impairs the obligation of the contract set out in the act of the 22d of April, 1882.

As will be seen, section 25, article 5, of the act of May 17, 1886 (Appendix I), undertakes to put into force and to revise, so far as the plaintiff in error and its property is concerned during the period of time the act of April 22, 1882, was in force, all the revenue law and provisions of the revenue laws that were repealed, in so far as the plaintiff in error and its properties were concerned, by the act of April 22, 1882.

The contention of the defendant in error that the act approved April 22, 1884, entitled "An act to amend the revenue laws," vol. 1, page 70–71, Sess. Acts of 1883–84, was an authority for the assessment, imposition, or collection of the taxes under consideration in this case, is founded on a misconception of the act itself, as will be seen from section 5 of that act, which in express terms provides that "this act shall not apply to any tax payable by any corporation on its corporate stock, but only to cases where an ad valorem tax is levied." (Appendix I.) The act discloses that there is no express repeal in it of the act of April 22, 1882, or any reference in it to the act of April 22, 1882, other than in this language, "that this act shall apply only to cases where an ad valorem tax is levied." Now, on the 22d day of April, 1884, no ad valorem tax was levied by the State on the plaintiff in error or

its property, and it is expressly set out in the act of the 22d of April, 1884, that it was not to apply in a case where no ad valorem tax was levied.

By section 6 of the act approved April 22, 1884, it is provided "that all laws and parts of laws inconsistent herewith are hereby repealed." Now, as the act of April 22, 1882, is not irreconcilable with or repugnant to any provision contained in the act of April 22, 1884, as both acts can be enforced in the same territory at the same time, and full effect given to each, it is perfectly clear that the act of April 22, 1884, furnishes no authority for the imposition, assessment, or collection of the tax under consideration in this case. It is clear that unless the act of April 22, 1884, operated as a repeal of the act of April 22, 1882, it furnished no authority for the imposition of any tax on the plaintiff in error or its properties, or the assessment of the plaintiff in error or its properties, for taxation by the State.

Not only was there no authority given by the act approved April 22, 1884, for the imposition, assessment, and collection of the taxes under consideration in this case, but the act itself was repealed by the act approved May 17, 1886, that went into effect on September 15, 1886.

In the case of the Commonwealth *vs.* the Railroad Companies, 95 Ky., pages 68 to 75, inclusive, the Court of Appeals, in determining the effect of the act approved May 17, 1886, upon the act as approved May 22d, 1884, and kindred acts, say:

> "In determining the force and effect of this latter act on prior legislation, general and special, regulating taxation in the Commonwealth, it is evident that its general purpose and intent should be given much weight. Manifestly the act of 1886 *is intended to compass the reform of the entire revenue law of the State, to constitute in itself a general and complete revenue system.* As argued by counsel, it singles out no special defect here and there, but is aimed broadcast at the whole structure, else why should it have re-enacted as it does many old laws in identical and equivalent terms. This general purpose, to be made effective and uniform, must sweep away a mass of special and class legislation adopted in pursuance of the system theretofore in practice. We notice first that all property, real and personal, shall be

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assessed for taxation, save that expressly exempted in the act itself. Not content with this the act proceeds to repeal all acts and parts of acts, general and special, inconsistent with itself or not in conformity to itself. Sunderland on Statutory Construction, sections 154, 155, 156; Endlich on the Interpretation of Statutes, section 201."

As the act of April 22, 1884, was inconsistent in many of its provisions with the act of May 17, 1886, the latter act, on the rules laid down by the Kentucky Court of Appeals, and according to the recognized canons of construction, repealed the act of the 22d of April, 1884. 143 U. S., page 2.

The taxes under consideration in this case were assessed and levied on the 9th day of January, 1891, more than four years and three months after the same went into effect, under authority of section 25, article 6, of the act of May 17, 1886, more than four years and three months after the act of April 22, 1884, had been repealed by the act of May 17, 1886. In the opinion delivered by the Kentucky Court of Appeals in this case it will be found recited, page 26 of the record, that:

"The authority for reporting the tax list to the clerk of the county court is to be found in section 25, article 6, chapter 92, of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows: 'It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may for any year or years have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's books for his county, and certify the same to the auditor on or before the last day of January in each year. The law does not specify how and in what manner or form the report shall be made, and that it appears that the clerk accepted the report and certified the same, as required by law, the report of the sheriff and the certificate of the clerk must be held sufficient for the purposes of this action.' . . . . The act of the 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues,

not to decrease them, and it expressly excepted all obligations incurred under existing laws from repeal. It is, therefore, clear that if appellant had become liable for the tax of 1886, the act *supra* did not release it from such liability, nor can we agree with the appellant that the act *supra* is only prospective. The evident purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with, and there is nothing in the act to authorize the conclusion that the power and the duty devolved upon the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act. Appellant insists that the revenue law of 1892 repealed the act of 1890, which authorized the bringing of such suits as this. We do not concur in the appellant's construction of the act of 1892. We do not think it was the intention of the legislature to repeal the act of 1890."

We thus have the express decision of the Court of Appeals to the effect that section 25, article 6, of the act approved on the 17th day of May, 1886, was the authority, and is the authority, for the assessment and imposition of the tax under consideration in this case; so that it is clear that the obligation of the contract as contained and set out in the act of April 22, 1882, in so far as it secured an exemption against the assessment and imposition of the tax, is violated by this subsequent legislation. But as seen from the opinion of the Court of Appeals, section 25, article 6, of the act approved May 17, 1886, was and is supplemented and amended by an act of the General Assembly of the Commonwealth of Kentucky, approved on the 23d day of May, 1890, entitled:

"'An act to amend the revenue laws of the Commonwealth of Kentucky, giving the State the power to sue for taxes,' Vol. I, pages 149–150, Sess. Acts 1889–90, and which is in words and figures as follows: 'The right and the power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which can not be collected by the ordinary methods of distraint and sale. Said suits may

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be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason can not be sold, and for the purpose of reaching intangible property which can not otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same." (Appendix II.)

Prior to May 23, 1890, it had become the settled law of the State of Kentucky that the properties of the defendant in error could not be taken, levied on, or sold by the sheriff or collecting officer to coerce the payment by it of any tax or assessment against it upon its property, and it had further become the settled law of the State of Kentucky that the State was without power to go into its courts and maintain an action against the plaintiff in error to recover any tax or assessment against the defendant in error or upon its property.

In the case of the Louisville Water Company *vs.* Hamilton, 81 Ky., 522, the Court of Appeals say:

> "This corporation, like a turnpike or railroad, can not be seized or sold by a collecting officer, nor the property necessary for its use, so as to deprive the public of the benefit to be derived from it, unless by legislative authority."

In the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 349, the Court of Appeals say:

> "It was held by this court in the case of Baldwin *vs.* Hewitt, auditor, &c., 88 Ky., 673, that taxes could not be recovered by suit in the absence of legislative authority, and there being no statute in this State save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. . . . . And the exercise of the power of taxation is legislative in character, while the collection of taxes when once authorized by the law-making power is ministerial. The one is legislative, the other executive; neither is a

judicial act, and one department of the government should be careful not to encroach upon the dominions of another. It is true that the judiciary may be called upon by the legislature to enforce the collection of taxes in a judicial way, but it has not done so in this State save as to railroads, where suit has been authorized to recover them, and this exceptional case inferentially says that the remedy can not be resorted to in other cases. . . . . The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it can not do so. We do not intimate whether in this instance the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If in such a case the State is likely to lose any of its revenue, the legislature can, by additional legislation in the form of penalties for the non-payment, or by authorizing suit for its recovery, provide against it, and will no doubt do so when in its wisdom it may be proper and necessary."

In the case of the Louisville Water Company *vs.* Clark, &c., 94 Ky., 54, the Court of Appeals say that the reason for the reversal by the Court of Appeals of the judgment of the court of first instance in the case of the Louisville Water Company *vs.* the Commonwealth, 89 Ky., 244, was that the court of first instance had no jurisdiction of the subject-matter of the action.

In the case of Baldwin *vs.* Hewitt, 88 Ky., 682, the Court of Appeals say:

> "The same reason which forbids the court to levy a tax forbids it from assuming the power to collect it."

In the case of McLean *vs.* Deposit Bank, 81 Ky., 258, the court say:

> "The judiciary has no power to levy taxes or to collect taxes when the officer appointed to collect them refuses to

> do so, or if no one is appointed to collect the judiciary is powerless to supply the defect. These are all legislative duties, and when the department of government to which these duties are confided neglects to discharge them, neither the judiciary or executive department of the government can execute these powers."

In the case of Merriwether *vs.* Garrett, 102 U. S., 472–573, this court, considering the same subject, say:

> "Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected and to designate the officers through whom its will shall be enforced."

We thus see that not only were the taxes under consideration in this case assessed and levied under the authority of section 25, article 6, of the act of May 17, 1886, but their collection was provided for by the act of the 23d of May, 1890, legislation that went into effect at least four years and six months in one instance, and more than eight years in the other instance after the date of the contract relied upon by the plaintiff in error as securing to it the exemption from liability for the taxes sued for, and hence it does certainly appear that the legislation complained of was subsequent to the date of the contract set up by the plaintiff in error, and it was legislation under which every right claimed by the plaintiff in error as vested in it by the contract of April 22d, 1882, was taken from it by the judgment of the courts of the State of Kentucky, and which furnishes the foundation for the writ of error in this action.

To this action, commenced upon the 9th day of January, 1891, to recover a tax from the plaintiff in error for the fiscal year of the State of Kentucky ending June 30, 1886, imposed and assessed under the authority of section 25, article 6, of the act approved May 17, 1886, and which did not go into effect until the 15th of September, 1886, and to this action thus commenced against it under the authority of an act approved on the 23d day of May, 1890, the plaintiff in error interposes as a defense the exemption from liability sought to be enforced against it in the action secured to it by the act of April 22d, 1882, and which act was in

force up to the 15th of September, 1886, covering the identical period of time for which the alleged taxes were levied. The plaintiff in error asserted in its answer that this contract exemption was protected by the Federal Constitution against any impairment of its obligation by the subsequent legislation of Kentucky authorizing the imposition and the assessment of the taxes in question and the action or suit against it for their recovery. This contention of the plaintiff in error was met by a decision of the court of first instance, and by the court of last resort in the State of Kentucky, that the act of April 22, 1882, did not constitute a contract between the State of Kentucky and the Louisville Water Company, and did not secure the immunity from taxation as contended for by the plaintiff in error, and hence the Federal question that gives to this court jurisdiction is whether or not it is with this court or the courts of Kentucky to determine whether the act of April 22, 1882, constitutes a contract, the obligations of which are protected by the Federal Constitution from impairment by said legislation.

AS TO JURISDICTION.

The question of jurisdiction was certainly considered in the case of the Louisville Water Company *vs.* Clark, 143d U. S., page 1. As that case involved the liability of the present plaintiff in error for the taxes of 1887, and the present contention is for the taxes claimed for 1886, the question of jurisdiction would seem to be settled by the first case *supra*. Whether the act approved 22d of April, 1882, does or does not constitute a contract is a question upon which this court acts independent of the State courts, and as to whether or not the subsequent acts of the General Assembly impair the obligation of that contract is a question for the independent action of this court.

In the Delmas *vs.* Merchants Insurance Company, 81st U. S., 759, the court say:

> "Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts giving such construction to the

contracts, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation. Bridge Prop. *vs.* Hoboken Co., 1 Wall., 145 (68 U. S., XVII, 576); J. B. B'k *vs.* Skelly, 1 Black, 436, (66 U. S., XVII, 173)."

In the case of the Northwestern University *vs.* the People, 99 U. S., 389, the court say:

"Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction. Jefferson B'k. *vs.* Skelly, 1 Black, 436, (66 U. S., XVII, 173); Bridge Props. *vs.* Hoboken Co., 1 Wall., 144 (68 U. S., XVII, 576); Delmas *vs.* Ins. Co., 14 Wall., 668 (81 U. S. XX., 759).

In the case of Vicksburg, Shrevesport and Pacific R. R. Co., *vs.* Dennis, 116 U. S., 771, the court say:

"In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract, although in the form of a statute, as well as whether its obligation has been impaired. L. & N. R. R. Co. *vs.* Palmes, 109 U. S., 244, 256, 257 (Bk. 27, L. ed., 922, 926), and cases cited; Wright *vs.* Nagle, 101 U. S., 791, 794 (Bk. 25, L. ed., 921, 922)."

In the case of Wright *vs.* New Jersey, 117 U. S., 1024, this court said:

"When it is charged that the obligation of a contract has been impaired by a State law, as in this case, by the general tax law of New Jersey as administered by State authorities and the State court justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefits of the constitutional protection."

In Jefferson Branch Bank *vs.* Skelly, 66 U. S., 173, this court said:

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and can not be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case, it makes no difference in the obligation of this court, in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation or has been made by a covenant or agreement by the agents of a State or by its authority."

In the case of Murrey *vs.* Charleston, 96 U. S., 432, 449, this court say:

> "The jurisdiction of this court over the judgments of the highest courts of the States is not to be avoided by the mere absence of an express reference to some provision of the Federal Constitution. Whenever rights, acknowledged and protected by that instrument, are denied or invaded under the shield of State legislation, this court is authorized

to interfere. The form and the mode in which the Federal question is raised in the State courts is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a State in suits where is drawn in question the validity of a statute of, or of an authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it is necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly. In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State courts expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided, and decided adversely to the Federal right. Everywhere in our decisions it has been held, that we may review the judgments of a State court when the determination or judgment of that court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised. In Crowell *vs.* Randall, 10 Peters, 368, it was laid down, after a review of almost all of our previous decisions, 'That it is not necéssary the question should appear on the record to have been raised, and the decision made in direct and positive terms, in *ipsissimis verbis*, but that it is sufficient if it appears, by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment.' This case is followed by Armstrong *vs.* Athens Co. Treas., 16 Peters, 281, when it was held sufficient to give this court jurisdiction. If it appear from the record of the State court that the Federal

question was necessarily involved in the decision, and that the court could not have given the judgment or decree which they passed without deciding it."

In the case of Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116, this court say:

> "Looking at the record before us and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey Legislature, a right to build their railroad bridge or viaduct over the Hackensack River, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the State of New Jersey, and, therefore, the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. It could not have done this without holding the act of 1860 to be valid, as it was the only authority in which the defendants rested their right to build any structure whatever over the Hackensack River. In holding the act to be valid, notwithstanding the plaintiffs claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789. It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiff's contract, and it is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

In the case at bar the defendant in error claimed the right of the State to tax the property and effects of the plaintiff, under authority of the act of May 17, 1886, notwithstanding the exemption from that liability, guaranteed by the act of April 22, 1882.

The plaintiff contended that to permit this was to violate the contract between the Commonwealth and itself, as set out in the act of 1882; that by reason of section 10, article 1, of the Constitution of the United States, and the contract as set out, there existed no right or authority on the part of the State to tax its property or effects, under the provisions of the act of May 17, 1886, which was the only and sole authority, as the court judicially knew, for the imposition of the alleged taxes. The court held that the alleged contract, the act of April 22, 1882, did not exempt the property and effects of the plaintiff in error from the operation and force of the act of May 17, 1886, and this decision brings the case within the very terms of the 25th section of the act of Congress of 1789.

In the case of Furman *vs.* Nichol, 8 Wallace, 44, this court say:

> "The circumstances under which this court is authorized to review the decisions of the State tribunals has been so often considered and decided, that there is hardly anything left to do but to apply the already well settled principles which govern this class of cases to a particular record in order to decide whether or not we have jurisdiction to hear and determine the matter in controversy. It would be useless labor to go through the various adjudications of this court on this subject. It is enough for the purposes of this suit to say that a cause can be removed from a State court into this court under the 25th section of the judiciary act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right he claimed it gave him was denied to him by the State court. It is urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to the case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches, and it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that

the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment, which it did. . . . . All courts take notice, without pleading, of the Constitution of the United States and the public laws of the State where they are exercising their functions. . . . . The defense really amounts to this, either that the alleged contract did not exist, or if it did, there has been no legislation that impairs it. Whether it be true or false, depends upon the construction to be given the laws of the State which are claimed as proving the making of the contract and its violation. If so, this court decides for itself whether the construction which the court below gave to these different statutes was correct or incorrect, and we are required to reverse, under the 25th section of the judiciary act, if we find that under an error of construction that court has adjudged that no contract has been impaired. To do otherwise would be to surrender to the State courts an important trust confined to this court by the Constitution. Without pursuing the subject any further, it is clear, from the record, that the Supreme Court of Tennessee, in dismissing the petition for mandamus, necessarily adjudged that there was not at the time such a contract as the plaintiff, Furman, claimed, authorized him to make the tender to the clerk of the notes of the Bank of Tennessee. The jurisdiction of this court is therefore complete, and the case must be decided on its merits." Williams *vs.* Bruffy, 96 U. S., 176–193; Arrowsmith *vs.* Harmoning, 118 U. S., 194; Chicago *vs.* Needles, 113 U. S., 574; Northern University *vs.* The People, 90 U. S., 309; Baltimore *vs.* Maryland, 21 Wallace, 456; Weston *vs.* Charleston, 2 Peters, 499.

In the case at bar the plaintiff in error contended that the act of April 22, 1882, was a contract between the State and itself, and vested in it a right to immunity from taxation by the State until withdrawn by the act of May 17, 1886, and that by the Constitution of the United States the State was forbidden to impair it.

The court below decided the act of April 22, 1882, accepted by the Louisville Water Company, was no contract between the State and the plaintiff in error, that it did not invest the plaintiff

with immunity from taxation by the State, as claimed, that it was not protected by the Constitution of the United States, and that the imposition of taxes by the State under the provisions of the act of May 17, 1886, consequently impaired the obligation of no contract. These issues were expressly made in the case and decided adversely to the plaintiff in error, and were necessarily decided in the judgment rendered, and we submit that this court has jurisdiction, and the case is properly in this court for final determination on its merits, and for the reasons given the case should be reversed.

Respectfully submitted, T. L. BURNETT AND
LANE & BURNETT,
Attorneys for Plaintiff in Error.

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Jefferson Branch Bank *vs.* Skelly, 66 U. S., 173.

Murrey *vs.* Charleston, 96 U. S., 432, 449.

Bridge Proprietors *vs.* Hoboken, &c., 1 Wallace, 116.

Furman *vs.* Nichol, 8 Wallace, 44.

APPENDIX I.

Section 1, chapter 42, General Statutes, page 652:

"The present fiscal year shall close on the thirtieth day of June, 1882, and thereafter the fiscal year shall begin with the first day of July and close with the thirtieth day of June following, and all regular reports and statements of accounts required by law of the various offices of State shall be made accordingly."

Section 22, chapter 21, General Statutes, page 294:

"When a law which may have repealed another shall be repealed, the previous law shall not be revived, unless the law repealing it be passed during the same session of the General Assembly."

Section 25, article 6, chapter 92, General Statutes, page 1060:

"It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor, and all property which corporations may have omitted for any year or years to have listed with the auditor, and said clerk shall enter the same on the assessor's book, for his county, and certify the same to the auditor on or before the last day of January in each year; and the said sheriff shall have, as compensation for said assessment, twenty-five cents, and, in addition to the fee, twenty-five per cent. on the taxes realized on said assessment. But this section does not include property erroneously described by the assessor."

Sections 5 and 6, chapter 970, Acts of 1883–84, page 71:

"This act shall not apply to any tax payable by any corporation on its capital stock, but only to cases where an ad valorem tax is levied; nor shall it in any wise be deemed as a repeal or modification of section ten, of article twelve, of chapter ninety-two, of the General Statutes.

"All laws and parts of laws inconsistent herewith are hereby repealed."

APPENDIX II.

An act to amend the revenue laws of the Commonwealth, giving the State the power to sue for taxes. Vol. I, pages 149–150, Sess. Acts of 1889–1890:

> "The right and power is hereby vested in the Commonwealth to institute and maintain its actions to recover taxes which may heretofore have accrued to the Commonwealth, or which may hereafter accrue, and which can not be collected by the ordinary methods of distraint and sale. Said suits may be instituted in courts of equity jurisprudence for the purpose of enforcing the State's lien on property which for any reason can not be sold, and for the purpose of reaching intangible property which can not otherwise be reached. But no action shall be instituted or maintained under the provisions of this act upon any claim for taxes that have been assessed or might have been assessed more than five years before the commencement of the same."